

70839-2

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NO. 70839-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN VANNESS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Z. Lucas, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SEARCH-INCIDENT-TO-ARREST EXCEPTION, LIKE ALL EXCEPTIONS TO THE WARRANT REQUIREMENT, MUST SATISFY THE POLICY RATIONALES THAT BROUGHT IT INTO EXISTENCE

Warrantless searches are presumed per se unreasonable unless they fall into one of the carefully drawn, jealously guarded exceptions to the warrant requirement. State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). “These exceptions are *limited by the reasons that brought them into existence*; they are not devices to undermine the warrant requirement.” Id. (emphasis added).

The search-incident-to-arrest exception is based on two policy rationales: disarming arrestees for officer safety and preventing arrestees from destroying evidence. United States v. Robinson, 414 U.S. 218, 234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (“The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.”). “If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” Arizona v. Gant, 556 U.S. 332, 339, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

- a. Stroud's prohibition on warrantless searches of locked containers best complies with the twin rationales underlying the search-incident-to-arrest exception

The Stroud¹ rationale, which requires a warrant before officers may search a locked container, ensures that searches incident to arrest are justified by the reasons for their existence. As the Stroud court explained, by locking a container, “the individual has shown that he or she reasonably expects the contents to remain private.” Stroud, 106 Wn.2d at 152. More importantly, “the danger that the individual either could destroy or hide evidence located within the [locked] container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual’s access to [its] contents” Id. Thus, under Stroud, warrantless searches of locked containers are not permissible because an arrestee has no possibility of gaining access to his or her locked container before officers may intervene. This commonsense, straightforward, and easy to apply holding is appropriate in all circumstances, both inside and outside the vehicular context.

Rather than discuss Stroud’s treatment of locked containers, or the policy justifications that underpin the search-incident-to-arrest exception, the State asserts that searches of locked containers located in vehicles are

¹ State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) (lead opinion), overruled in part on other grounds by Buelna Valdez, 168 Wn.2d 761, 777, 224 P.3d 751 (2009).

“analytically distinct” from searches of locked containers outside the vehicular context. Br. of Resp’t at 11-12. Yet the State engages in no analysis whatsoever regarding this supposed analytical distinction. This court should reject the State’s conclusory assertions.

There is no analytical distinction between a search of a locked container located among an arrestee’s personal effects and a search of a locked container located in an arrestee’s personal vehicle. In either case, by placing items in a locked container, an arrestee has manifested a clear intent that the contents remain private. An arrestee has no opportunity to unlock and open a locked container before arresting officers are able to prevent the arrestee’s access. Officers should accordingly be required to obtain a warrant before searching any locked container.

In this case, Vanness was handcuffed and surrounded by multiple officers at the time officers searched his locked box. 1RP² 16-18, 22. He did not resist arrest and his personal effects, including the locked container, were entirely in the possession and control of arresting officers. 1RP 29-30. Because there was no possibility that Vanness could access his locked box, the search-incident-to-arrest exception does not apply. Officers’ failure to obtain a warrant violated VanNess’s constitutional rights and requires suppression of the locked container’s contents.

² This brief will use the same citation convention as the opening brief. See Br. of Appellant at 4 n.2.

- b. Byrd³ and its recent progeny are easily distinguished and should be limited to their facts

In Byrd, our supreme court held that searches made of the person and personal effects at the time of the arrest are constitutionally permissible. State v. Byrd, 178 Wn.2d 611, 617-18, 310 P.3d 793 (2013). This basic holding was applied more recently in State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31, 33-34 (2014). But neither Byrd nor MacDicken addressed whether officers had authority of law to search a locked container in an arrestee's possession. Byrd and MacDicken therefore should not be read expansively to control this case.

As Byrd and MacDicken made clear, searches of an arrestee's personal effects at the time of arrest extend “only to articles “in such immediate physical relation to the one arrested as to be in a fair sense a projection of his [or her] person.”” MacDicken, 319 P.3d at 34 (quoting Byrd, 178 Wn.2d at 623 (quoting United States v. Rabinowitz, 339 U.S. 56, 78, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (Frankfurter, J., dissenting))). Under this time of arrest rule, officers could conduct a warrantless search of a purse on Byrd's lap and of laptop and rolling duffel bags in MacDicken's possession when they arrested Byrd and MacDicken. MacDicken, 319 P.3d at 34; Byrd, 178 Wn.2d at 623-24. Our supreme court simply considered

³ State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013).

Byrd's purse and MacDicken's bags the fair sense projections of their persons. MacDicken, 319 P.3d at 34; Byrd, 178 Wn.2d at 623.

While the Byrd and MacDicken decisions may have permitted officers to search VanNess's backpack, VanNess's locked box does not qualify as a fair sense projection of VanNess's person. As Byrd was careful to explain, searches of an arrestee's personal effects "always implicate Chime^[4] concerns for officer safety and evidence preservation." 178 Wn.2d at 618. Indeed, a purse or backpack provides an arrestee easy access to weapons or evidence. The same is not true for locked containers. As discussed above, an arrestee would have to take the additional time to unlock the container with a key or to enter a combination, allowing officers to intervene before an arrestee could access a locked container's contents. Thus, unlike weapons or contraband in a purse or backpack, the contents of a locked box present minimal danger to officers or evidence. Accordingly, locked boxes do not implicate Chimel concerns and do not constitute a fair sense projection of the arrestee's person. Given that "the proper scope of the time of arrest rule is narrow, in keeping with the 'jealously guarded' exception to the warrant requirement," Byrd, 178 Wn.2d at 623 (quoting State v. Ortega, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)), this court should

⁴ Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

limit Byrd and MacDicken to their facts and hold that VanNess's locked container falls outside the scope of the search-incident-to-arrest exception.

A more expansive reading of Byrd, as the State proposes, see Br. of Resp't at 11, would render the warrant requirement an empty vessel. The search-incident-to-arrest exception is just that—an exception to the rule that officers must obtain a warrant before conducting a search. Exceptions to the warrant requirement must be justified by the policy reasons for which they exist. Patton, 167 Wn.2d at 386. As our supreme court has held, locked containers do not implicate officer safety or evidence destruction concerns. State v. Buelna Valdez, 167 Wn.2d 761, 776-77, 224 P.3d 751 (2009); Stroud, 106 Wn.2d at 152. Were this court to interpret Byrd to allow searches of locked containers, it would allow the search-incident-to-arrest exception to swallow the rule that search warrants are required. This court should hold that the search of VanNess's locked box was not justified by the search-incident-to-arrest exception, that the warrantless search violated VanNess's constitutional rights, and that the evidence obtained from the illegal search must be suppressed.

2. THE INVENTORY SEARCH EXCEPTION REQUIRES A SHOWING OF MANIFEST NECESSITY THAT WAS ABSENT IN THIS CASE

Our supreme court has recently indicated that inventory searches of locked containers are not constitutionally permissible “because privacy

interests exhibited by placement of any property in such containers . . . outweigh the need to inventory the contents” State v. Tyler, 177 Wn.2d 690, 708, 302 P.3d 165 (2013). “The only exception is where manifest necessity exists.” Id.⁵

The record in this case is clear that no manifest necessity existed. During the CrR 3.6 suppression hearing, Officer Edmonds admitted that there was no evidence that VanNess’s locked box contained a firearm, incendiary device, chemical agent, or any other dangerous item. 1RP 21-22; cf. State v. Ferguson, 131 Wn. App. 694, 703-04, 128 P.3d 1271 (2006) (holding inventory search of locked container justified given chemical odor emanating from container). Accordingly, the inventory search exception did not justify the search of VanNess’s locked container. The illegally obtained evidence must be suppressed.

Rather than address the manifest necessity rule that wholly undermines its position, the State instead resorts to fear mongering, noting that bombs, firearms, and other hazards might be present in locked containers. Br. of Resp’t at 16 & n.6, 17 & n.7. While protection of officers

⁵ Contrary to the State’s suggestion that the manifest necessity rule announced in State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980), might have been abrogated by United States Supreme Court precedent, Br. of Resp’t at 14 n.5, our supreme court in Tyler repeatedly cited Houser with approval. Tyler, 177 Wn.2d at 698, 701, 707-08, 712. The manifest necessity rule is therefore alive and well, and unquestionably remains Washington law. Moreover, the Tyler court appeared to construe the Houser rule as an application of article I, section 7’s protections. Tyler, 177 Wn.2d at 708.

and the public “are valid and important purposes” of the inventory search exception, “[w]ithout more, these purposes will not serve to justify an inventory search in each and every case.” Houser, 95 Wn.2d at 154 n.2; see also Tyler, 177 Wn.2d at 710. The mere possibility that the contents of a locked box might present a danger is not enough to justify an inventory search. This court should reject the State’s disingenuous appeal to fear.

In addition, the State argues that the inventory search was justified in this case because it was carried out pursuant to the policy of the Everett Police Department. Br. of Resp’t at 15, 17. It is telling that nowhere in the State’s briefing does the State respond to VanNess’s assertion that ““where a search is improper it cannot be legitimized by conducting it pursuant to standard police procedure.”” Br. of Appellant at 19 (quoting Houser, 95 Wn.2d at 154). The State cannot rely on an unconstitutional police procedure to make the inventory search of VanNess’s locked box constitutional.

Apparently dissatisfied with clear and unmistakable Washington authority, the State cites foreign authority in an attempt to justify the inventory search in this case. Br. of Resp’t at 17-20 (excerpting State v. Pastos, 269 Mont. 43, 50-51, 887 P.2d 199 (1994)). Pastos does little more than engage in the same fear mongering discussed above to justify an inventory search. 269 Mont. at 50-51. Moreover, Montana does not appear

to have a manifest necessity rule and its constitution allows invasions of privacy upon only a “showing of a compelling state interest.” MONT. CONST. art. II, § 10. Because Montana’s constitution does not guaranty the same quantity or quality of protection as article I, section 7—protections that our supreme court has provided through Houser’s manifest necessity rule—Montana’s decisional law on the inventory search exception is inapposite.

Finally, the State misstates the evidence in this case, asserting that Officer Edmonds “insured that there were no dangerous items in the backpack” before transporting the backpack to the evidence property room. Br. of Resp’t at 20. The State also asserts that the purpose of the inventory search procedure “was not for discovering evidence of criminal activity and did not give excessive discretion to the officer.” Br. of Resp’t at 20. If Officer Edmonds had conducted a thorough search of VanNess’s backpack and guaranteed that it contained no dangerous items, the State’s assertions might have more merit. But the record is clear that Officer Edmonds ceased his search upon prying open the locked container, did not search additional items in the backpack, and admitted during his suppression testimony to finding items in the backpack later that he had not found during his initial search. 1RP 25-26. Officer Edmonds’s halfhearted search of the backpack entirely belies the State’s claim that officer safety justified an inventory search in this case. Officer Edmonds’s failure to conduct a thorough search

more probably suggests that he utilized the inventory search merely as a pretext to discover the contents of VanNess's locked container. This court should not accept the State's erroneous recitation of the clear facts in this case.

The trial court properly ruled that the inventory search exception did not justify the search of VanNess's locked container. The warrantless search violated VanNess's constitutional rights. This court must suppress the unlawfully obtained evidence.

3. THE SEARCH WARRANT APPLICATION WAS BASED ENTIRELY ON TAINTED, INADMISSIBLE EVIDENCE

The State acknowledges that Officer Edmonds based his application for a warrant entirely on what he saw and smelled when he pried open VanNess's locked container. Br. of Resp't at 23; see also 1RP 23; CP 102. As discussed, opening the locked container was unconstitutional. The question is therefore whether there were otherwise sufficient, independent facts for a neutral and detached magistrate to make a determination of probable cause. State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990); State v. Coates, 107 Wn.2d 882, 888, 735 P.2d 64 (1987). The answer is no. Aside from the contents of the locked container observed via an unlawful search, there were no other facts that showed Vanness possessed controlled substances at all. Thus, the search warrant application was based

entirely on illegally obtained evidence. The evidence seized pursuant to the search warrant was therefore fruit of the poisonous tree and should have been suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

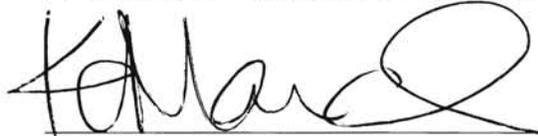
B. CONCLUSION

The search of VanNess's locked container violated VanNess's rights to privacy, as no exception to the warrant requirement justified the search. The fruits of the warrantless search must be suppressed. Because the warrant that later issued was based entirely on inadmissible evidence, the additional evidence found pursuant to the search warrant was fruit of the poisonous tree and must also be suppressed. The only evidence that supported VanNess's convictions was obtained in violation of his constitutional rights. Therefore, this court must reverse VanNess's convictions and remand with instructions to dismiss this prosecution with prejudice.

DATED this 30th day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 70839-2-1
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STEPHEN VANNESS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF APRIL, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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X *Patrick Mayovsky*

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